FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-989

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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CITY OF NORFOLK, VIRGINIA, *et al.*,
*Petitioners,*

v.

HERBERT M. COLLINS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY BRIEF FOR PETITIONERS

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Respondents contend (Br. in Opp. 9-10) that the Fourth Circuit, in striking down the at-large voting system in Norfolk, merely applied settled principles embodied in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the decision of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). But two things to the contrary stand out clearly from the court of appeals' decision. First, the court viewed this case as turning specifically on whether black voters were able to elect *two* representatives to the Norfolk City Council (*i.e.*, the number roughly proportional to their percentage of the population). Second, the court concluded that black voters had been unable to elect the requisite number of representatives primarily by adopting a legal presump-

tion that certain officials with majority black support were not "representatives of choice" and, further, by finding that other officials were elected because of "special circumstances." As we discuss below, respondents' efforts to soft-peddle these new rules are wholly unpersuasive.

## I. THE COURT OF APPEALS APPLIED A PROPORTIONAL REPRESENTATION STANDARD.

Respondents quite correctly note that the Fourth Circuit acknowledged the proviso of Section 2 disclaiming proportional representation as the standard for a violation (Br. in Opp. 10). But the court of appeals' own words make absolutely clear that the goal of proportional representation controlled its analysis of the case. At the very beginning of its opinion, the court defined the "principal issue" as "whether the complainants have less opportunity than other members of the electorate to elect *more than one* councilman as the 'representatives of their choice.'" Pet. App. 2a (emphasis added). Shortly thereafter in its review of the facts, the court expressly compared the black percentage of total population with the degree of electoral success, observing that "[a]lthough the city's population is 35% black and the rate of black participation in the electoral process is high, black citizens were unable to elect *more than one black* member (14%) to the seven-member council until after this case commenced." Pet. App. 4a-5a (emphasis added).

The court of appeals returned to and further stressed this theme in its all-important analysis of minority voting success. It began by stating explicitly that "[i]f the degree of minority electoral success necessary to defeat this voting rights action were the ability to elect a single candidate to the council, this action would border on the frivolous"; it then noted, however, that "this case involves the community's inability to elect *a second member* until after the institution of this action." Pet. App.

15a (emphasis added). Next, after acknowledging that most black candidates receiving at least 70% black voter support have won in Norfolk, with victories in 7 of 10 elections between 1968 and 1986, the court dismissed these statistics as "superficial," on the ground that they "ignore the fact that from 1968 until after this action was brought, the black community was unable to elect a *second representative* to the city council." Pet. App. 15a (emphasis added). Then, having recited the definition of legally significant polarized voting set forth in *Gingles*, the Fourth Circuit stated that "[i]n the context of this case it is necessary to apply *Gingles*' teaching to the black community's attempt to elect a *second black* councilman." Pet. App. 15a (emphasis added). The analysis that followed was focused entirely on elections for this "second seat." See Pet. App. 16a (white voting patterns defeated "minority preferred candidates who sought a second seat on the council"); *ibid.* ("black community . . . could not elect a second representative of their choice"); *ibid.* ("minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters").

If this emphasis on electing representatives to a "second seat" is not tantamount to an inquiry into "proportional representation," it is hard to imagine just what it could be. Certainly, Judge Chapman had no difficulty in recognizing the analysis as one equating a violation with a lack of proportionality: "There is no other way to construe this language than to conclude that the failure to achieve proportionality and the § 2 violation are one and the same." Pet. App. 33a. Judge Chapman, in fact, observed that "the decision does not merely creep up to the notion of proportionality, it embraces it." *Ibid.*

Respondents counter (Br. in Opp. 11) that nothing in the Voting Rights Act "restricts the right of protected minority voters to elect candidates of their choice to only one seat." But this assertion only begs the question. The

Act declares, in the plainest of language, that it is not establishing a right to proportional representation. In this case, however, the Fourth Circuit has concluded that a city in which black-supported candidates have usually won over two decades must abolish its long-standing electoral system because the system (in its view, at least) does not produce proportional representation.[1] Nothing in the Act or in *Gingles* provides a sound basis for that approach.[2]

## II. THE COURT OF APPEALS APPLIED AN IMPROPER DEFINITION OF "REPRESENTATIVES OF CHOICE."

Respondents' brief makes it clear that there is no dispute between the parties as to the numbers: the candidates supported by a majority of the black voters of Norfolk usually have been elected. *See* Pet. 4 (Table). The parties differ over the meaning of the statutory term "representatives of choice."

The proper definition of "representatives of choice" is of critical importance in this case. The Fourth Circuit and respondents say that, even in multi-seat elections, a

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[1] Only by eliminating several successful candidates found by the district court to be representatives of choice could the Fourth Circuit even conclude that the black community's representation on City Council was not usually proportional. See pages 4-8, *infra*.

[2] Respondents do not defend the court of appeals' focus on *black* candidates in judging black voters' ability to fill a second council seat. The relevance of candidates' race is, as *Gingles* makes clear, an open question. It is also an important question. In this regard, the approach of the Fourth Circuit here conflicts with the Tenth Circuit's ruling in *Sanchez v. Bond*, 875 F.2d 1488, 1496 (10th Cir. 1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989), rejecting a § 2 vote-dilution claim by Hispanic voters based on the election of non-Hispanics. That inconsistency cannot be dismissed simply by pointing out, as respondents do (Br. in Opp. 15 n.8), that *Sanchez* involved different facts.

candidate receiving a majority of black votes should be presumed not to be a "representative of choice" whenever an unsuccessful candidate receives more black votes. In that circumstance, according to respondents and the court of appeals, there is only one "representative of choice"—the unsuccessful candidate—even though several seats were at issue, voters had the opportunity to vote for more than one black candidate, and the successful candidates received not just majority black voter support but black political endorsement as well. Br. in Opp. 3, 7, 16. In our view, this sort of line-drawing takes too narrow a view of the statutory term. Rather, as the district court ruled, in elections like Norfolk's, *all* of the candidates receiving majority black support are properly considered "representatives of choice." [3] A loss by the first-ranked candidate, of course, counts as a defeat in the portion of the *Gingles* analysis that considers "usual defeat." But such a loss does not mean that there is only one representative of choice in a multi-seat election. A presumption to the contrary is improper.[4]

As we have noted, the position taken by the Fourth Circuit is at odds with the position taken by the Fifth

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[3] Respondents are wrong in stating (Br. in Opp. 16) that the district court held that, "as between a black candidate who receives over 73% of the black vote and a white candidate who receives only 58%, . . . the white candidate is the preferred candidate of black voters." Rather, the district court considered *both* of the candidates receiving majority black support as representatives of black voters' choice. *See* Pet. App. 56a, 66a, 68a.

[4] There is no merit to respondents' suggestion (Br. in Opp. 2, 7) that petitioners cannot challenge use of this presumption because we did not seek review of the decision in *Collins IV* announcing the presumption. It is well-established that when a court of appeals announces a legal rule and remands the case for its application, a litigant may challenge both the rule and the application in appeals following the proceedings on remand. *Diaz v. Patterson*, 263 U.S. 399 (1923).

Circuit in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989), and with the position taken by the United States as Amicus Curiae in *Gretna* (No. 88-597, at 11). See also *Williams v. State Board of Elections*, 718 F. Supp. 1324, 1328 n.8 (N.D.Ill. 1989), and *Sanchez v. Bond*, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989). In *Gretna*, the Fifth Circuit stated directly:

> In a multiple seat election such as Gretna's aldermanic race, the minority *necessarily* will have more than one preferred candidate. 834 F.2d at 502, (emphasis added).[5]

We submit that the view of the Fifth Circuit, and not that of the Fourth Circuit, is the correct one. But, in any event, the issue is one of considerable importance and warrants the attention of this Court.[6]

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[5] Respondents' attempt to distinguish *Gretna* (Br. in Opp. 15) serves only to emphasize the conflict between the two Circuits. The quote relied on by respondents makes clear that, when black voters support more than one candidate in a multi-seat election, *all* of the candidates should be counted in determining whether the voters are usually unable to elect "representatives of their choice." Had the Fourth Circuit followed that course here, it could not have removed Mr. Staylor and Mrs. Howell in 1974 and Mrs. Howell in 1980 from the "win" column.

[6] Respondents' reliance on *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989), is misplaced. In *Campos*, the Fifth Circuit affirmed a district court finding that the white candidates were not representatives of black voters' choice in elections in which no black candidates ran. *Id.* at 1245. That ruling—based on the district court's finding that black voters had no real choice in those elections—has no application here, for the district court in this case made a contrary finding and black candidates ran in all of the elections at issue.

## III. THE COURT OF APPEALS ERRONEOUSLY APPLIED A "SPECIAL CIRCUMSTANCES" TEST, DISCOUNTING BLACK ELECTORAL SUCCESSES.

Having discounted several black electoral successes because of the presumption just discussed, the court of appeals went on to discount other successes as the products of two "special circumstances": the pendency of this lawsuit and the fact that some black elected officials were incumbents. Since respondents add little to what the court below said, we make only a few brief points.

First, we note again that the facts involved in the election of Rev. John Foster in 1984 (after this suit had begun) were thoroughly reviewed and discussed by the district court.[7] The Fourth Circuit not only too lightly displaced the district court as the fact finder (contrary to Rule 52(a) and *Anderson v. City of Bessemer*, 470 U.S. 464 (1985)), but it did so by improperly focusing once again on the need for a *second* black council seat. That is to say, the Fourth Circuit's conclusion rested chiefly on the erroneous approach that, in judging whether Reverend Foster received unusual white support, the only proper basis for comparison was the white support given to *black* candidates seeking a *second* council

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[7] Respondents improperly denigrate the John Foster victory in 1984, claiming that "for all practical purposes [he] was unopposed . . . because there were only two *competitive* white candidates and three seats were open." Br. in Opp. 19 (emphasis added). There were ten candidates for three seats in that election, four black candidates and six white candidates. Pet. App. 208a. Mrs. Butts received an almost identical number of white votes as John Foster. Had black voters shifted their votes away from Mrs. Howell, who was endorsed by the Rainbow Coalition, to Mrs. Butts, both Mrs. Butts and Rev. Foster would have won. Respondents' continued insinuation (Br. in Opp. 19) that one of three seats was left open by an alleged white slating group was considered and found unsubstantiated by the district court and not disturbed on appeal. Pet. App. 76a-78a. Rather than showing a unique election, the results were consistent with the coalition politics evident in Norfolk since 1968.

seat in other elections. That focus has no more place here than in the analysis of election results as a whole.

Second, as to incumbency, neither legal principle nor common sense dictates that the "*repeated* re-election of black incumbents" (Br. in Opp. 20 (emphasis added)) should be a basis for discounting electoral successes. A councilman elected with strong black support, as a general rule, should be no less a "representative of [black voters'] choice" simply because he had been elected with similar support before. Here, measured by any reasonable standard, the re-election of Joseph Jordan in 1972 and 1976, the re-election of Joseph Green in 1982 and 1986, and the re-election of John Foster in 1988, all by overwhelming black majority vote, are properly regarded as black electoral successes.

## IV. THE COURT OF APPEALS FAILED TO ADDRESS THE DISTRICT COURT'S "TOTALITY OF CIRCUMSTANCES" DETERMINATION.

As noted in the petition, in none of the post-*Gingles* decisions to come before this Court had a district court found every factor relevant to a Section 2 violation in favor of the jurisdiction and yet been reversed on liability by a court of appeals.[8] While respondents suggest that "the effects of . . . past discrimination continue to be perpetuated," (Br. in Opp. 3), the district court found to the contrary (Pet. App. 42a), and these findings were

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[8] Respondents assert that when this case reached the Fourth Circuit "[e]very factor critical to a Section 2 violation had been resolved in plaintiffs' favor except one." Br. in Opp. 6. If, as it appears, respondents are referring to the three "precondiitons" identified in *Gingles*, the statement erroneously suggests that simply meeting the preconditions is enough to establish a violation of Section 2 without regard to the "totality of circumstances." If respondents are referring to the "factors" set out in the Senate Report as relevant to a Section 2 violation, the statement is incorrect. All of the Senate Report "factors" had been resolved in petitioners' favor. Pet. App. 42a-43a.

not challenged on appeal. By use of an erroneous definition of legally significant polarized voting, the court of appeals would allow respondents to "prove" a Voting Rights Act violation without addressing the detailed findings of the district court that under the "totality of circumstances" the black population of Norfolk has an equal opportunity to elect representatives of choice. That is flatly contrary to the teaching of *Gingles*.

## CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the writ should be granted.

Respectfully submitted,

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